Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

No. 92-1011

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HUGH K. WINTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

1. Whether the Court of Military Appeals erred in ruling that consideration of extensive evidence prejudicial to defendant in a plea providency hearing was not a *per se* disqualification and employing no other standard.

2. Whether the Court of Military Appeals erred in determining that the thoroughness of the judge in conducting the plea providency hearing satisfactorily demonstrated his impartiality, rather than concluding that the judge's conscientiously detailed inquiry did itself render him objectively suspect.

3. Whether the Court of Military Appeals erred in not requiring a record of due consideration of recusal by a judge who had heard extensive evidence prejudicial to defendant during a plea providency hearing.

4. Whether the Court of Military Appeals erred in limiting the minimum requirement for recusal to whether an intractible opinion as to the guilt of the accused was formed, rather than whether an opinion on one or more key elements of the offense was formed.

5. Whether the Court of Military Appeals erred in not finding reversible error in the fact that the military judge failed to remind the accused of his right to trial by a panel after a plea providency hearing in which he had heard substantial evidence prejudicial to defendant.

6. Whether the Court of Military Appeals erred in relying on the Defense to move for recusal or a trial by members rather than following the rule that the judge must decide such matters without request.

7. Whether the Court of Military Appeals erred, first in not accepting review of the question of whether, as a matter of law, the evidence at trial was insufficient, and then, when the record before it manifested that fact, in failing to recognize the prejudicial impact of the procedural improprieties previously presented.

8. Whether this Court, pursuant to its authority over all federal judicial proceedings, ought to direct that under some conditions, including those of this case, a military judge must recuse himself, or convene a panel to try the facts of the case.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Hugh K. Winter, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on August 28, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at ———— (C.M.A. 1992) (Appendix A). The opinion of the United States Air Force Court of Military Review issued on ———— is reported as ———— (A.F.C.M.R.) (Appendix B).

JURISDICTION

The Final order of the United States Court of Military Review was entered on September 29, 1992 (Appendix C). The jurisdiction of the Court is invoked under 28 U.S.C.A. 1359(3) (Supp. 1992) and 10 U.S.C.A. 867 (a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1 of the Constitution of the United States provides in pertinent part:

> The Judicial Power of the United States shall be vested in one Supreme Court. . . .

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . . be deprived of life, liberty, or property without due process of law. . .

The Fourth Amendment of the Constitution of the United States provides in relevant part:

> [N]or shall any state deprive any person of liberty or property, without due process of law. . .

STATEMENT OF THE CASE

Petitioner was convicted, contrary to his pleas, of one charge and one specification of murder, in violation of Article 118, UCMJ. (He pleaded guilty to involuntary manslaughter, in violation of Article 119, UCMJ, but the military judge rejected these pleas). The charge was based on the 7 October 1989 death of appellant's 7 week old infant son.

Petitioner was a 19 year old, recently wed father at the time of the alleged offense. The child was Petitioner's first and he appears to have had no previous experience in child rearing whatsoever. The infant was apparently afflicted with colic and thrush, a condition that

caused him to cry and fuss considerably. Testimony demonstrated that Petitioner was very concerned about his son's well-being. (R. 168-172). On 28 September 1989, appellant had taken the baby to Cannon AFB hospital. The child was running a fever and had gone limp while appellant was bouncing the new born on his knee. (Pros. Exh. 3 & 4). After a battery of tests, the medical personnel told Petitioner that the child had colic and gave the young couple medicine for thrush. (Pros. Exh. 5).

On 7 October 1989, Petitioner sat with the baby while his wife went to a nearby shop to get her hair cut. (R. 78-86; Pros. Exh. 3 & 4). The child had been fussing and crying. Petitioner, in statements made to the police later, indicated that he placed the baby over his shoulder to burp the youngster. The child went limp, and, in an effort to arouse him, appellant shook him with increasing vigor. The child did not respond and appellant tried to bathe the baby in the sink, as this had on 28 September 1989 helped revive the child. The baby still did not respond and Petitioner began to panic. He called his wife at the beauty shop and when she arrived home, the young couple drove the baby to the hospital.

Medical personnel tried to resuscitate the lifeless child, but to no avail. (R. 62-64; 86-94; 95-97; 98-122). Attending physicians testified that the baby appeared to have died 30 minutes to 2 hours prior to his arrival at the hospital. (R. 89-90).

A subsequent autopsy showed two injuries to the baby's brain and several minor bruises on his head and scalp. (Pros. Exh. 9). Retinal hemorrahages and optic nerve sheath damage, coupled with the subdural hematoma, led the forensic pathologist to conclude that the baby had been shaken and that this shaking had caused brain injuries leading to his death. (R. 123-138).

Such other facts as are necessary to the issue presented are contained in the argument.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Court has often provided guidance, leadership, and direction to lower Courts regarding conduct of their proceedings. Without such direction, lower courts, while attempting to provide a fair and balanced process to all parties, do not provide clear and definite standards in some areas. This case presents an opportunity to forge rules for the proper conduct of pre-trial and trial proceedings, the lack of which brings into doubt the fairness of judicial proceedings.

This case depends upon a fundamental legal principle familiar to all Courts, namely, the factfinder in any trial must decide the case based upon the evidence presented at the trial and no other facts. In this particular case, the military judge heard a great deal of testimony outside the trial. He was required to do so in order to determine the providence of the defendant's guilty plea to a lesser charge. Nevertheless, but in the course of that hearing, the judge heard evidence which incriminated the defendant but was not presented or even admissible at trial. The judge formed firm conclusions concerning the sufficiency of the facts to justify a finding against the defendant on all but one of the elements of the charge, and then after being dissatisfied concerning the final element and rejecting the plea, the judge proceeded to try the case without a panel.

This Court has previously cautioned on the danger of extensive pre-trial involvement of the trial judge especially in a felony criminal case. The concern this court has always shown for this problem was expressed by Mr. Justice Black as follows:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even

> the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law" *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13. *(In Re Murchison*, 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623 (1955)

This case provides an occasion to establish some clear guidelines for this problem area. It would not solve every problem, but could help the trial courts in some of their more difficult situations.

I. THE COURT OF MILITARY APPEALS APPLIED THE WRONG STANDARD FOR DETERMINING WHAT PRETRIAL INFORMATION WAS PERMITTED THE TRIAL JUDGE.

The Court of Military Appeals' opinion is absolute. Three times, in differing words, the court recited that there is simply never a requirement that the trial judge be required to step aside because of his involvement in legitimate pretrial proceedings. (Opinion Court of Military Appeals, p. 3). The same court in another case announced a different rule. In *U.S. v. Bradley*, 7 M.J. 332 (CMA 1979), the trial judge accepted a guilty plea after a providency hearing. The case was not resolved but had to be tried, and was tried, by the same judge. This same

Court of Military Appeals ruled the judge should not have tried the case and said at p. 334:

> In a case such as this, where the judge not only has gained detailed knowledge of the factual basis for the offenses charged but also necessarily has been required to reach certain conclusions regarding an accused's factual and legal guilt and to have manifested those conclusions by having accepted pleas of guilty and entering findings of guilt both the fact and the appearance of "impurity" are presented by the judge's continuing to act as the factfinder in the trial.

This simply contradicts the same court's statement in this case at p. 4. There is no *per se* rule that military judges are disqualified whenever, after accepting guilty pleas, they must later reject those pleas based on unforeseen circumstances. The Court of Military Appeals did not use this case as an occasion to overrule *Bradley*. Instead it adopted an opinion inconsistent with its own prior decision. The evident confusion evidenced by the Court of Military Appeals on this point shows the need for guidance from this Court.

The Court might further consider that this case should be taken because the injustice suffered by this defendant is the result of a process decried by other courts. There is a divergence of judicial opinion on this matter. It is to be noted first that no one contends that each and every involvement by the trial judge in pretrial proceedings should result in his disqualification. This is also true of plea bargains, where available, or plea providency hearings. The question is whether there is any level or type of pretrial involvement, as was present in this case, which is excessive. We submit there was too much done by the trial judge before trial and that he was exposed to matters so prejudicial that it was objectively unreasonable for him to proceed. Particularly applicable is the statement relied upon in *Bradley* from *U.S. v. Walker*, 473 F.2nd 136, 138 that even "the disciplined judicial mind should not be subjected to any

unnecessary strain; even the most austere intellect has a subconscious." As spelled out more precisely by the Army Court of Military Review in *United States v. Peterson*, 23 M.J. 828 (ACMR 1986), following *Bradley*, the Court found the standard to be applied was objective. "*The test is whether a reasonable person who knew all the facts would question (the Judge's) impartiality.*" Note the test is not whether the Judge was in fact impartial, but whether the impartiality is reasonably subject to question. Surely, in this case the record at the very least raises a serious question about the Judge's appearance of impartiality. Here the Judge rejected a plea on the ground that the last element of the offense was uncertain, thereby clearly having already accepted all the other elements as certain and true.

To spell out the two opposing views, it is instructive to recall the fanciful metaphor dredged up by the Air Force Court of Military Review and repeated by the Court of Military Review. Federal judges, it was said, have bathtub minds. Pull the plug and everything drains out. The metaphor is necessary to justify the result in this case. No one thinks a judge actually forgets what he has previously heard. It is only when one is distracted by the image of the emptied tub that one can forget that the reality is the living, thinking human being on the bench. The need of the Courts below to justify their decisions on the basis of fanciful imagery demonstrates the flimsiness of their decisions. It also shows the need for this Court to establish a more firm standard.

A case cited by the Court of Military Appeals stated the following:

> There may be of course, cases in which factual admissions made during the plea providence inquiry, or the compelling nature of evidence presented prior to any withdrawal of the plea, are such as to impel the judge to be convicted of the accused's guilt and mentally unable to make an impartial decision.

United States v. Melton, 1 M.J. 528 (AFCMKR 1975) at p. 530-31, see CMR decision at p. 5-6. But both the Air Force Court in that case and the Courts below in this case left this matter to the unfettered discretion of the trial judge.

This Court decided in *Merchison* above, that there are instances when the involvement of the judge in pretrial activity was too great and could not be permitted. This Court decided that reliance on the discretion of the trial court judge insufficient in that case. Other courts have drawn the line on such involvement, but not consistently. We suggest the following standards in summary, should be the law:

A judge can obtain too much information prior to trial for him to be able to be and to appear to be impartial at trial.

A judge can be exposed to evidence both too compelling and too prejudicial prior to trial for him to be and to appear to be impartial at trial.

Both of these standards are not to be left to the discretion of the trial judge alone but are subject to review on the basis of whether a reasonable person who knew all the facts would question the judge's impartiality.

The Court below then applied the wrong standard. It relies upon "the discretion of the judge." (ibid.), not "the sound discretion of the trial judge." (The same Court in *Bradley*, at p. 333.) The difference is crucial and clear. The former standard admits of no defined limitations; the latter acknowledges that some limits upon judicial discretion do exist. No judge should be required to walk a mental tightrope along the straight line of the evidence at the trial when the gravity of the inadmissible evidence heard in a prior hearing and his own definite conclusions must weigh upon him so heavily to one side. Proper balance is improbable. Bias against the defendant is so likely, that no evidentiary proceeding afterward, however

free of error and however balanced, can be trustworthy. A reasonable man must doubt that the verdict was untainted. That should be all that is required for reversal.

This standard was adopted by Congress for all Federal Judges in 1974 in 28 USC, par. 455 (1974), which reads in pertinent part:

> 455. Disqualification of justice, judge, or magistrate
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

We submit that this is the proper standard and not the standard of leaving the matter to the unreviewable discretion of the trial judge. This Court is uniquely situated to promulgate this standard universally by accepting this petition.

II. A MAJOR SAFEGUARD DESIGNED TO PREVENT IMPROVIDENT GUILTY PLEAS CAN AND DID MATERIALLY OBSTRUCT A FAIR AND IMPARTIAL TRIAL.

The Rules for Court Martial in Section 910 established a procedure for dealing with guilty pleas, and where available, plea bargains. (Not all the Armed Services allow plea bargains. The Air Force does not). It is similar in purpose though differing in content from Rule 11 of the Federal Rules of Criminal Procedure. The judge must make inquiry of the voluntary nature of the plea and the awareness of the nature of his admissions by the defendant as well as informing him of what rights he is giving up by entering a guilty plea. This rule, no less than Rule 11, is the source of substantial problems. The judge will inevitably learn that the defendant admits something. The more meticulous, thorough, and detailed the hearing, the more tainted will be any subsequent trial of the matter. In this case the judge did not merely ask the defendant the requisite minimum to establish the

requirements for acceptance of the plea. He guided the defendant through a detailed description of the events, a recitation of each and every contact of the defendant with the deceased, its duration and manner. Defense counsel had informed the judge the defendant wished to demonstrate his remorse by entering a plea. Twice during his description of his son's death defendant "broke down" in the reporter's description, thus confirming to all his "remorse". Remorse is a combination of guilt and sorrow. Both the description and its manner left a burning picture of defendant-petitioner's guilt. None of that was admissible evidence under the privilege against self-incrimination, but all of it was heard because of the requirements of Rule 910.

This case provides an opportunity for the court to caution against excessive detail in disclosures in a plea hearing, against inflammatory or emotionally compelling demonstrations in such hearings, and against receiving constitutionally or legally inadmissible evidence in them. If judges are forwarned that such matters are to be avoided, they may better assure the integrity of the process. In the rare case where the judge deems it appropriate to delve very deeply into the facts of the case in the interests of justice, the law provides a remedy, recusal from the subsequent trial if by judge alone. Without such a rule, the process for safeguarding against improvident pleas does itself become a means for undermining the integrity of the judicial process.

III. THE FAILURE OF THE TRIAL JUDGE TO CONSIDER RECUSAL AND TO MAKE A RECORD OF SUCH CONSIDERATION CONSTITUTED ERROR IN ITSELF.

The American Bar Association's Canons of Judicial Conduct were developed in cooperation with the Judiciary. They have been followed and approved by many courts. The Court of Military Appeals even cited part of the relevant canon in its decision, at p. 4:

> *See also* Canon 3.C.(1)(a), ABA Code of Judicial Conduct (1989 edition) ("A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . .

That the trial judge must always consider recusal is not a new rule. It was followed before the above Canon was formalized. The first case found on point in the civilian courts was *U.S. v. Gallington*, 488 F.2d 637 where the court said at p. 639:

> *After rejecting a plea under these circumstances, a judge may excuse himself* from further involvement in the case *and should give serious consideration to doing so.* See, ALI Model Code, supra at 12-113; President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 136 (1967); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 13 (1967). See also, *Brown v. Peyton*, 435 F.2d 1359 (4th Cir. 1970) (Winter, J. Dissenting). (emphasis supplied)

All civilian courts which have addressed the subject agree. In *U.S. v. Le Frere*, 553 F.Supp. 133, the judge wrote at p. 135:

> Even courts that do not believe a recusal is mandatory have noted that a judge should give serious consideration to recusing from further involvement in a case where he has seen the presentence report. *Lyon*, Supra, 588 F.2d at 583. They have conceded that it is "preferable" to avoid having the same judge try the case.

Accord *U.S. v. Montecalvo*, 545 F.2d 684, *U.S. v. Lyon*, 588 F.2d 581, *U.S. v. Sonderup*, 639 F.2d 294.

The record in this case affirmatively establishes that the trial judge gave no consideration to recusal. Instead he peremptorily turned to the business of the trial. In rejecting the plea of Petitioner Hugh K. Winter, the Court said:

MJ: Okay. I tell you what I'm going to do, Airman Anthony, I'm going to reject your plea, and I'm going to enter a plea of not guilty on your behalf and require the United States to prove your guilt to me beyond a reasonable doubt, if they can.

MJ: Are you prepared to go tomorrow?

TC: I am prepared to go tomorrow, yes.

MJ: All right. You prepared to go tomorrow, sir?

DC: Yes, your honor.

Note that the judge addressed the defendants-petitioner by the name of his deceased son, seven week old Anthony Winter. We will later suggest that this is only one sign that the judge must have been profoundly affected by the content of the plea providency hearing. He was evidently not able to address or even think about the possibility of recusal.

The Court of Military Appeals has failed to enforce, or even recognize, the requirement of consideration of recusal which is acknowledged as mandatory by many other courts. Acceptance of this petition will allow this court to resolve this inconsistency and to establish the proper rule.

IV. THE JUDGE SHOULD HAVE RECUSED HIMSELF BECAUSE HE HAD FORMED A FIRM OPINION ON KEY ELEMENTS OF THE CASE.

In the plea providency hearing the judge, after first informing the defendant of his rights and ascertaining that his plea was voluntary, conducted a detailed inquiry into the facts of the case. He divided the particular offense into its four elements and inquired into each in turn. Only after he was fully satisfied concerning each element did he move on to the next. He was satisfied that the first three elements were true and inquired of the fourth, namely, intent or state of mind. On this he found grounds for doubt and therefore he rejected the plea. This last element was the only element on which the plea offered did differ from the offense

charged. The judge was therefore convinced of the truth of three of the four elements of the petitioner's case.

The Court of Military Appeals would require the judge to recuse himself if he had formed an intractible opinion as to the defendant's guilt, that is under all elements of the crime. Here three, but not all four, of the elements as outlined by the judge were found satisfactorily proved in the hearing and the judge, but for his reservations on the last element, was ready to convict. The trial was therefore merely an exercise with respect to all elements but the last if the judge was truly convinced of the truth of the first three. The prosecutor's burden had been reduced from proving all elements of the offense charged to proving but one. Surely fairness is not merely technical. *Bradley* would require recusal if a formal finding of guilt had been signed. The formality of a written finding is only one manifestation of the mind of the judge. The actual determinations in this case were no less real and no less clear.

Indeed, the record indicates that the judge had made up his mind. There had been an earlier incident mentioned by the defendant when the child had been shaken.

The judge even framed a conclusion about the earlier incident.

> But, now, would you agree that *shaking a baby severely enough to* in essence *knock him out, which is what happened in the first place, I suspect,* would exceed the normal barriers of parental touching? I mean parents should not touch children in the way as to cause them to lose consciousness. Would you agree with that? (R. 41. Emphasis supplied).

This and other remarks along with the judge's necessary formation of conclusions about every fact concerning the crime alleged, in order to fulfill the purpose of

the providency hearing, make it clear that the Judge was convinced of the defendant's guilt before the trial began.

This case gives the Court an opportunity to clarify whether a judge should be disqualified only when he has made a formal finding of guilt, has formed an intractible conclusion of guilt, or when the judge has formed or manifested a belief as to the truth of one or more essential elements of the offense charged.

V. UPON CONCLUDING THE PLEA PROVIDENCY HEARING, IT WAS ERROR FOR THE JUDGE NOT TO REOPEN THE QUESTION OF DEFENDANTS RIGHT TO A TRIAL BY PANEL OF MEMBERS.

The Court of Military Appeals itself acknowledged in its last footnote to its opinion, that is, in its last word on this case that:

> There is *one lingering question* that is: should the military judge be required, as a matter of law, *to ask the accused whether he or she desires to continue to be tried by military judge alone* after the military judge rejects an accused's plea? Art. 16(1)(B), Uniform Code of Military Justice, 10 USC 816(1)(B); RCMK 903, Manual Supra. (p. 8, Emphasis added)

Clearly the judge not only failed to raise the matter but preemptorily foreclosed it by directing the case to trial.

The Air Force Court of Military Review phrased the matter even more strongly, at p. 4 of its decision:

> The military judge should have explained Winter's options when he rejected the plea.

Surely, this principle finds meaningful application here. Petitioner's election of trial without a panel occurred before his plea to a lesser charge. It occurred before he or his counsel could know the nature and extent of the plea hearing. The election was no longer valid because it was not informed of events which occurred before trial

which would make the impartiality of the trial proceedings susptec. The election of forum should have been reconsidered at that time.

The Air Force Court of Military Review gave three reasons why such error might in this case be dismissed as harmless (at p. 4):

> (1) the government independently proved all facts that Winter had admitted during the providence inquiry; (2) the government had always intended to proceed to trial on the charged offense, even if the pleas to the lesser included offense had been accepted; and (3) the military judge is entitled to the presumption that he performed his sworn duties properly. *See* Article 59(a), UCMJ.

These are patent rationalizations.

1) Whether the government proved all necessary facts beyond a reasonable doubt is a question no reviewing court may determine. Once the trial forum is tainted, no level of proof is sufficient. We submit furthermore that the proof was not sufficient at trial.

2) That the government always intended to proceed to trial does not address the matter of the propriety of the forum. Trial could still be had before a panel.

3) The presumption of proper performance of the judge is nothing other than unfettered discretion in other terms, no standards at all.

If a judge should reopen the question of convening a panel, and his failure to do so is admitted error by the AFCMR, then such failure must be reversible error to have meaning at all. Choice of forum is fundamental, and irreversible, not like an evidentiary ruling where facts may be succeptible of proof in another way. There is no cure for such an error, so the error must be fatal.

This case gives this Court the opportunity to rule that the requirement that the reopening of the question of choice of trial by judge or by jury or panel after a plea hearing is mandatory, not merely discretionary.

VI. THE ONUS FOR THE PROVISION OF AN IMPARTIAL FORUM IS ON THE JUDGE, NOT THE DEFENDANT.

Both the federal statute on judicial impartiality and the ABA Canon of Judicial Conduct recited above are requirements directed at the Judge alone. They do not require a motion or other request by any party. The judge must himself assure the integrity of the forum. None of the cases cited above on recusal or mandatory consideration of recusal require that those matters first be raised by motion of defendant before they are reviewable issues. The Court of Military Appeals therefore ignored the proper question and skirted the real issue when at p. 8 in footnote 6, in reference to reopening the question of trial by panel, the court made as its last comment.

> While this is clearly the preferred practice, we also mention that *nothing prevented defense counsel from requesting this relief.* See n.4, *supra.* Therefore, we decline at this time to hold that the failure of a military judge to discuss this option with an accused constituted reversible error.

In accepting this Petition the Court can establish firmly that the responsibility for establishing that a fair forum is maintained for trial is quintessentially that of the judge, and not dependent on the actions of the defendant.

VII. THE DECISION OF THE COURT OF MILITARY APPEALS DEMONSTRATES THAT THE TRIAL PROCESS WAS HOPELESSLY CORRUPTED.

We have argued that the emotional and compelling nature of the facts of this case and of the proceedings in the trial court, especially the plea providency hearing, are so mesmerizing that no one could be exposed to them without such profound effect; that it is unreasonable to expect anyone who heard or read the transcript of the plea providency hearing to shut it out of his mind and consider the question of guilt on the basis of the trial evidence alone; and that anyone who is familiar with the

providency hearing is extraordinarily likely to consider the trial evidence in a light supplemented by the testimony of the prior hearing. The opinion of the Court of Military Appeals establishes, verifies, and indeed embodies this reality.

In footnote 1 the Court of Military Appeals recites the facts of the case (emphasis supplied):

> [1] Evidence presented at trial indicated the infant's death resulted from what is commonly referred to as "Shaken Infant Syndrome" (the shaking of a small child to the point that injury results). *During the providence inquiry, appellant admitted he had shaken the baby* to try to end constant crying brought on by two maladies—colic and thrush, both of which caused the baby considerable discomfort. At trial, a forensic pathologhist concluded that the baby had been shaken and that action led to injuries which were the cause of death. An autopsy revealed injury to the infant's brain, several minor bruises to the head and scalp, retinal hemorrhages, and optic-nerve-sheath damage.

Even the United States Court of Military Appeals, so far removed from the hearing and trial, could not insulate itself from the revelations in the hearing in reciting the relevant facts of the record. This *lapsus linguae* is more revealing than the convolutions that Court's arguments described. With the issue precisely framed before it of the need to assure that the case be adjudged on the trial evidence alone and not at all by admissions in the providency hearing and with months to formulate its opinion, the reviewing Court resorted to evidence from the hearing to demonstrate the propriety of the result. How much more difficult must it have been for the trial judge who lived through the hearing only a few hours before trial to separate the one from the other.

This case illustrates that the procedural protections relied on by our judiciary are not merely theoretical niceties. The record in the trial of this case contains no evidence whatsoever that the defendant violently shook

the deceased. The only evidence of shaking was that of a Deputy Sheriff who took statements from the defendant after the incident. The Deputy Sheriff's version of the defendant's actions were anything but violent: ". . . the baby went limp. He attempted to shake the baby to revive him, gave it a warm bath to try to revive it" (R. 80 and again at R. 81, (emphasis supplied).

A: He just said that he held it by the trunk of the body under the arms and shook the baby (holding his arms at chest level, witness indicated a *slight shaking motion* with his hands.)

This defendant was convicted by the evidence of the providency hearing, not of the trial. His appeal was rejected on the same evidence. This gross injustice alone justifies granting Review.

VIII. THIS COURT SHOULD DIRECT LOWER COURTS' PROCEEDINGS SO THAT THEY COMPLY WITH MINIMUM STANDARDS.

In *McNabb v. United States*, 318 U.S. 332, 87 L. Ed. 819, 63 S. Ct. 608, at p. 340, Mr. Justice Frankfurter observed that in that case, as perhaps in this case it was:

> unnecessary to reach the Constitutional issue presesd upon us. For, while the power of this Court to undo convictions in state courts is limited to enforcement of those "fundamental principles of liberty and justice, *Herbert v. Louisiana*, 272 U.S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as "due process of law" and below which we reach what is really trial by force.

Similarly in *Cheff v. Schnackenberger*, 384, U.S. 373, 16 L. Ed. 2nd, 86 S.Ct. 1523, the Court exercised similar supervisory authority over contempt proceedings, at p. 380.

> Therefore, in the exercise of the Courts supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof.

This case is suitable for the exercise of the Court supervisory power, since the *Cheff* particularly, the questions presented here relate to the conduct of federal judicial proceedings. The fact that this is a military rather than a civilian matter should no longer be the obstacle it was once thought to be. One reason, though not the only reason, is that effective 1984, Congress gave this Court jurisdiction to review decisions of the Court of Military Appeals. The power to correct is the power to direct. If this Court can review and revise any and all judgments of the Military's highest court, it can provide direction to all such courts.

This separate basis for a ruling would leave it unnecessary to address State Courts whose procedures differ from those in federal forums and indeed differ greatly one from another.

Many of the questions presented by this case could be resolved by the exercise of the Court's supervisory power. The Court could, upon granting this Petition, establish extensive requirements for the conduct of pretrial hearings and subsequent trials if it is satisfied after briefs and argument that these matters have been sufficiently developed. More readily, the Court might find one or at most two items worthy of its making mandatory such as the renewal of the question of whether the defendant desires a trial by jury or panel after a plea hearing fails to resolve a case, or whether a judge must consider and

make a record of considering recusal at that time. This case presents an opportunity for correcting an injustice as well as establishing useful precedent.

CONCLUSION

Petitioner's case is worthy for grant of Certiorari since it presents several questions which the Court can clarify for the future. The Court can establish that excessive exposure to pretrial matters should disqualify a judge and that this is not a matter for the discretion of the judge alone. Further, the court can establish particular procedural requirements and its parameters such as the requirement of consideration of recusal and a record thereof after a hearing on a plea, and the need to let a defendant renew his choice of trial by judge or by panel or jury at a critical time. Finally, this Court can reaffirm that the Judge has the non-delegatable duty to assure the fairness of the forum for trial, and that failure to adhere to this principle may not be excused by lack of objection by any party.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 66,573

ACM 28660

UNITED STATES,

Appellee

v.

HUGH K. WINTER, Airman U.S. Air Force,

Appellant

Argued March 4, 1992

Decided Aug. 28, 1992

Counsel

For Appellant: *Robert G. Peterson* (argued); *Colonel Jeffrey R. Owens* and *Captain Michael D. Burt.*

For Appellee: *Captain David C. Wesley* (argued); *Lieutenant Colonel Brenda J. Hollis* (on brief); *Major Paul H. Blackwell, Jr.*

Military Judge: Miguel A. Pereira.

Opinion of the Court

COX, Judge:

We are asked to decide whether a military judge erred by proceeding with a bench trial after rejecting an accused's proffered guilty pleas. We find no error and affirm.

Appellant was charged with the unpremediated murder of his 7-week-old baby son.[1] Art. 118, Uniform Code of Military Justice, 10 USC § 918. He elected to be tried by a military judge alone and entered pleas of not guilty to the murder charge; but by exceptions and substitutions, he also entered pleas of guilty to the lesser-included offense of involuntary manslaughter. Art. 119, UCMJ, 10 USC § 919. Notwithstanding appellant's pleas, trial counsel gave notice of intent to prosecute appellant on the murder charge.

The military judge then conducted an inquiry into the providence of appellant's guilty pleas to the lesser offense. *United States v. Care*, 18 USCMA 535, 40 CMR 247 (1969); RCM 910(e), Manual for Courts-Martial, United States, 1984. However, appellant failed to satisfactorily complete the inquiry.[2] Accordingly, the judge

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[1] Evidence presented at trial indicated the infant's death resulted from what is commonly referred to as "Shaken Infant Syndrome" (the shawing of a small child to the point that injury results). During the providence inquiry, appellant admitted he had shaken the baby to try to end constant crying brought on by two maladies—colic and thrush, both of which caused the baby considerable discomfort. At trial, a forensic pathologist concluded that the baby had been shaken and that action led to injuries which were the cause of death. An autopsy revealed injury to the infant's brain, several minor bruises to the head and scalp, retinal hemorrhages, and optic-nerve-sheath damage.

[2] Specifically, the military judge questioned the accused as follows:

> MJ: Shaking a baby playfully, playing with a baby and watching them smile and whatever, that is the proper parental role and in this respect, a touching would not be unlawful. A touching is only unlawful when the ofrce applied is done without legal justification or excuse. That is to say, do you believe that the application of force by you, if it was in the extreme, was done without legal justification or excuse nad was beyond this allowable parental touching?
>
> ACC: At the time, sir, no, but after looking back on it, yes, I would say so now.

The judge believed that appellant had not admitted the wrongfulness of the touching, stemming from the assault on the infant. *See*

rejected the guilty pleas, entered pleas of not guilty for appellant, and proceeded immediately to trial. Art. 45 (a), UCMJ, 10 USC § 845(a).

The judge warned government counsel not to use any information elicited during the providence inquiry, except for impeachment purposes. *See United States v. Holt*, 27 MJ 57 (CMA 1988). The trial proceeded without objections by either party, and appellant was convicted as charged.[3]

Appellant now contends that the military judge should have disqualified himself, *sua sponte*, because of his exposure to admissions which established every element of the *charged* offense except the intent to kill or inflict great bodily harm. Para. 43b(2)(d), Part IV, Manual, *supra*. Appellant contends that such knowledge rendered the judge unable to act as a neutral and detached finder of fact. We do not agree.

When an accused pleads guilty, he must "be questioned under oath" as to the accuracy of his pleas. *United States v. Care*, *supra*; RCM 910(e). Should each questioning raise a "potential defense," the judge must explain this defense and reject the pleas if the defense is not negated. *See* RCM 910(e), Discussion. Thereafter, the judge will enter pleas of not guilty, and the Government will again bear the burden of proving beyond a reasonable doubt the offenses for which the not-guilty pleas were entered.

In the present case, the steps detailed above were followed. The miiltary judge rejected appellant's guilty

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para. 44b(2)(c) and (d), Part IV, Manual for Courts-Martial, United States, 1984.

[3] Appellant was sentenced to a dishonorable discharge, confinement for 12 years, total forfeitures, and reduction to airman basic. The sentence was approved by the convening authority, and the Court of Military Review affirmed the findings nad the sentence. 32 MJ 901 (1991).

pleas on appellant's behalf. Then, the Government proceeded to prove that appellant murdered his baby son. Nevertheless, on appeal appellant asserts that, after rejecting the pleas, the judge should have disqualified himself or convened a panel of members to try appellant.

Clearly, "personal bias" on the part of a judge calls for that judge's recusal. *United States v. Jarvis*, 22 USCMA 260, 262, 46 CMR 260, 262 (1973); *see also* Canon 3.C.(1)(a), ABA Code of Judicial Conduct (1989 edition) ("A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bas or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . ."). However, "generally there is no restriction on the military judge alone" trying a case where the judge has found guilty pleas improvident. *United States v. Hodges*, 22 USCMA 506, 507, 47 CMR 923, 924 (1973). There is no *per se* rule that military judges are disqualified whenever, after accepting guilty pleas, they must later reject those pleas based on unforeseen circumstances. Even more so, there is no invariable requirement that judges *sua sponte* recuse themselves in all such cases. *United States v. Hodges*, *supra*; *United States v. Kauffman*, 3 MJ 794 (ACMR 1977). *See also United States v. Thomas*, 7 MJ 299 (CMA 1979); *cf. United States v. Collins*, 6 MJ 256 (CMA 1979).[4]

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[4] Further, we do not presume that defense counsel was incompetent in failing to object. Indeed, the record of trial reflects that defense counsel tactically intended and sought to keep the assigned military judge. In support, we note that suspicions about the military judge arose not from defense counsel, but rather from trial counsel. Trial counsel knew the military judge had recently presided over another "baby shaking case." During trial counsel's void dire of the judge, it was further established that the same defense counsel (Major Burr) served in both cases. The judge confirmed this and also elaborated about his willingness, if re-

We acknowledge, however, that even though a judge is not *per se* disqualified from presiding over a bench trial after rejecting guilty pleas, the facts of a partciular case may still require recusal of the military judge, especially if the judge has formed an intractable opinion as to the guilt of the accused. *Cf. United States v. Bradley*, 7 MJ 332 (CMA 1979). Fundamental legal principles require judges to decide cases based on evidence presented at trial.[5]

Appellant contends that, in this instance, the judge heard too much during the guilty-plea inquiry; that as a rational human being, the judge must have reached certain conclusions and formed opinions about the case; and that, to insure fairness and eliminate any appearance of impropriety, the judge should have recused him-

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quested, to submit a letter of clemency for the accused in that case. Therefore, one could conclude that defense counsel knew he had a favorable forum in which to present a defense.

[5] The United States Court of Appeals for the District of Columbia wrote specifically about the dichotomy and strains placed on a trial judge as follows:

> The District Judge is presumed to have a trained and disciplined judicial intellect, which in a nonjury trial can receive evidence, rule on its admissibility, and discard from his eventual decision on the merits that evidence which he has ruled to be inadmissible for the purposes of his decision . . . .

However, that same court also warned:

> The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious.

United States v. Walker, 473 F.2d 136, 138 (D.C.Cir. 1972). The strain placed on the minds of jurists is not lightly passed over. We also acknowledge, per the Court of Military Review's opinion, the strain placed on military judges and civilian trial judges in general. As the Court of Military Review noted in its decision below, trial judges have "bathtub minds," or "the ability to fill their heads with the facts immediately necessary, then pull the plug and scour away all recollection of the previous matter, before refilling for a new situation." 32 MJ at 903, *citing* Mayer, "Justice, The Law and the Lawyer," *Saturday Evening Post* at 37 (February 26, 1966).

self or at least convened a panel to try the case. *United States v. Cockrell*, 49 CMR 567 (ACMR 1974), *pet. denied*, 23 USCMA 640 (1975); *cf. United States v. Sherrod*, 26 MJ 30 (CMA 1988). We do not agree.

First and foremost, it was by his own request that appellant was tried by military judge alone. Art. 16(1)(B), UCMJ, 10 USC § 816(1)(B). Moreover, trial counsel had placed defense counsel, the accused, and the military judge on notice that he intended to prosecute the accused for the offense of murder. Thus, the evidence received by the military judge at trial was no greater or lesser than what he would have received if he had accepted the proffered pleas to involuntary manslaughter and the Government had proceeded with the trial on the murder charge. Indeed, it can be argued that appellant was in a better situation because the military judge rejected his pleas based on a possible defense. In any event, this military judge was not disqualified because of his participation in the guilty-plea inquiry.

Appellant also contends that even if the judge was not disqualified he should have impaneled a court-martial of members. Because we have concluded that the military judge was not disqualified, this was certainly an option available to him, but not a requirement. *See United States v. Sherrod*, *supra* at 33.[6] Both the United States Army and Air Force Courts of Military Review have considered whether a *per se* rule should be established to govern those instances where an accused has attempted

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[6] There is one lingering question, that is: should the military judge be required, as a matter of law, to ask the accused whether he or she desires to continue to be tried by military judge alone after the military judge rejects an accused's plea? Art. 16(1)(B), Uniform Code of Military Justice, 10 USC § 816(1)(B); RCM 903, Manual, *supra*. While this is clearly the preferred practice, we also mention that nothing prevented defense counsel from requesting this relief. *See* n. 4, *supra*. Therefore, we decline at this time to hold that the failure of a military judge to discuss this option with an accused constitutes reversible error.

to plead guilty but the pleas have been rejected; yet neither court has done so. *See United States v. Cockrell, supra*; and *United States v. Melton*, 1 MJ 528 (AFCMR 1975), *pet. denied*, 2 MJ 159 (1976).

The Army Court of Military Review invited an accused to challenge the military judge for cause if the accused believes that the judge has formed any opinion of guilt based upon the information he gained in the providence inquiry. *United States v. Cockrell, supra* at 573. Indeed, that court required the judge to "recuse himself . . . if he has any doubt as to his ability to render justice to either side." *Id.* Lastly, that court expressed a preference for having the military judge recuse himself unless the accused expressly consents to having him continue as the military judge. *Id.* at 574.

The Air Force Court of Military Review viewed the situated as less critical and declined an invitation by appellate defense counsel to adopt the Army's more formalistic approach. However, the bottom line remains the same. Senior Judge Roberts stated:

> [W]e believe that the matter of recusal . . . is best left to the independent judgment of the military judge involved. There may be, of course, cases in which factual admissions made during the plea providence inquiry, or the compelling nature of evidence presented prior to any withdrawal of the plea, are such as to impel the judge to be convinced of the accused's guilt and mentally unable to make an impartial decision. If that is the case, it is for him to decide whether the better course of action would be to remove himself from further participation. Similarly, he may conclude that he might properly conduct the trial but that in the interest of fairness and impartiality, the accused should be permitted to withdraw his request for trial by military judge alone. In the alternative the judge may, on his own motion, direct that the case be tried before a mili-

tary jury. *United States v. Cockrell, supra*; *United States v. Bryant*, 23 USCMA 326, 49 CMR 660 (1975).

United States v. Melton, supra at 530-31. This view of the law comports with our own. *See United States v. Sherrod, supra* at 33.

We are satisfied that this appellant received a fair and impartial trial and that the findings were based upon legally competent evidence of record.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 28660

UNITED STATES

v.

AIRMAN HUGH K. WINTER, FR 497-80-1673
UNITED STATES AIR FORCE

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29 March 1991

Sentence adjudged 12 April 1990 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Miguel A. Pereira (sitting alone).

Approved sentence: Dishonorable discharge, confinement for twelve (12) years, total forfeiture of all pay and allowances and reduction to E-1.

Appellate Counsel for the Appellant: Captain Michael D. Burt (argued); Colonel Richard F. O'Hair, Lieutenant Colonel Jeffrey R. Owens, and Major Ronald G. Morgan (on brief).

Appellate Counsel for the United States: Major Morris D. Davis (argued); Colonel Joe R. Lamport, Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., and Major Leonard R. Rippey (on brief).

Before

LEONARD, RIVES, and JAMES
Appellate Military Judges

OPINION OF THE COURT

RIVES, Judge:

When he rejected a guilty plea after receiving admissions from the accused, did the judge err by proceeding with a bench trial? Lacking direct evidence, did the government nonetheless prove that the appellant murdered his infant son by violent, repetitive shaking? When a mannequin's head flew off during the government's courtroom demonstration, did that so inflame the judge as to deny the appellant a fair trial? These are among the many questions presented in this case. We conclude that no prejudicial error was committed.

Airman Hugh Winter was convicted of the unpremeditated murder of his infant son, in violation of Article 118, UCMJ. The convening authority approved the adjudged sentence: a dishonorable discharge, confinement for 12 years, total forfeiture of all pay and allowances, and reduction to E-1.

I

In this trial by judge alone, Winter entered pleas of guilty to the lesser included offense of involuntary manslaughter in violation of Article 119. During the providence inquiry into the guilty pleas,[1] he admitted every element of the *charged* offense under Article 118, other than having an intent to kill or inflict great bodily harm. Ultimately, the military judge rejected the pleas. He entered pleas of not guilty on Winter's behalf and proceeded immediately to trial.

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[1] *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969); R.C.M. 910(e).

On our initial review of the record, we were concerned with the propriety of this procedure, and we specified the following issue:

> WHETHER THE MILITARY JUDGE ERRED BY CONTINUING TO SIT AS FACT FINDER AFTER CONDUCTING A PROVIDENCY INQUIRY AND REJECTING THE PLEA?

Before Winter elected trial by judge alone, the military judge was questioned extensively by the trial counsel concerning the judge's service as trial judge in an unrelated case tried recently at the same base. That case had also involved the death of an infant, allegedly caused in a manner similar to that suffered by Winter's son. Trial counsel was concerned about some post-trial comments allegedly made by the judge, which possibly indicated disagreement with the verdict returned by the members. The judge had also offered to provide a clemency recommendation to the convening authority. Neither the trial counsel nor the defense counsel challenged the military judge for cause. The judge carefully explained these matters before granting Winter's request for trial by judge alone.

The trial counsel informed the judge that the government intended to proceed with proof of the charged offense despite Winter's pleas to the lesser included offense. The parties did not agree to a stipulation of fact.

During the providence inquiry, Winter made admissions to the elements of proof for involuntary manslaughter. While reviewing the elements for a second time, the judge expressed concern that Winter seemed not to accept the wrongfulness of his conduct. When specifically asked again whether he knew his actions were wrong at the time he applied force to his child, Winter stated, "At the time, sir, no, but looking back on it, yes, I would say so now."

The military judge raised the possible defense of mistake of fact concerning the wrongfulness of the touching that had occurred. After colloquy between the judge, both counsel, and the accused, the judge announced that he was rejecting the pleas. He also stated that he would preclude the prosecution from using any information elicited during the providences inquiry (except possibly for purposes of impeachment). *See United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). He reminded the parties that the government had the burden of proving all elements of the offense. Neither trial counsel nor defense counsel voiced any concerns or objections.

When the guilty plea was disapproved, the military judge should have considered the following options: (1) recusing himself from further participuation in the trial; (2) offering the accused the option to withdraw his request for trial by judge alone; (3) directing that trial proceed with members; or (4) continuing to serve as military judge. DA Pamphlet 27-173, *Trial Procedure*, paragraph 27-4b (20 April 1990). Here, the parties simply proceeded with the trial. No one discussed the propriety of continuing the bench trial after the judge had received admissions from Winter and then rejected his pleas. No one discussed the impact of that decision on Winter's choice of forum.

Recusal of the trial judge under these circumstances is not mandatory. *United States v. Melton*, 1 M.J. 528 (A.F.C.M.R. 1975). The decision rests in the discretion of the judge. *United States v. Haynes*, 29 M.J. 610 (A.C.M.R. 1988); *United States v. Kauffman*, 3 M.J., 794 (A.C.M.R. 1977). When the judge, as here, does not recuse himself, he must ignore matters that are not properly before the court.[2] This is not a new principle, nor

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[2] When a plea is rejected *after findings*, it will normally be necessary for the judge to recuse himself in a bench trial. R.C.M. 910(h)(2), Discussion; *United States v. Peterson*, 23 M.J. 828 (A.C.M.R. 1986).

is it unique to this situation. A judge must frequently disregard irrelevant matters from deliberations.

Recently, we reviewed a case that involved a request for trial by judge alone. The prior day, the same judge had tried a co-actor on similar charges in a bench trial. Explaining the situation to the accused, Judge Donald E. Weir stated:

> I will preside over this case based solely on the evidence presented to the court in this case and without reference to the preceding case. This military judge takes his oath seriously. That is what I am required to do. That is what I will do. A wise observation from one of our appellate brothers in this area was made some months ago describing the duty of a military judge as being like taking a judicial bath.[3] Once the case is over, you pull the plug from the drain and all the evidentiary water goes down the drain in that case. You then move on to another case and the bathtub is again filled with all the evidentiary water in that case and this court will have absolutely no difficulty in basing any decision and reaching any findings it has to reach based solely on the evidence adduced at this court and without reference to the preceding case.

Although these points were not articulated in this case, we will defer to the presumption that a military judge knows the law and performs his duties properly. *United States v. Stein*, 20 U.S.C.M.A., 518, 519, 43 C.M.R. 358, 359 (1971); *United States v. Phillipson*, 30 M.J. 1019

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[3] The reference was contained in an unpublished, Per Curiam decision of this Court. In that case, we referred to an insight from Judge Learned Hand, who commended trial judges for their "bathtub minds;" i.e., the ability to fill their heads with the facts immediately necessary, then pull the plug and scour away all recollection of the previous matter, before refilling for a new situation. *See* Mayer, "Justice, The Law and the Lawyer," *Saturday Evening Post*, February 26, 1966, p. 37.

(A.F.C.M.R. 1990); *United States v. Long*, 20 M.J. 657 (N.M.C.M.R. 1985).

Careful reading of the record of trial supports the conclusion that this trial judge ignored matters brought out during the providence inquiry. *United States v. Cahn*, 31 M.J. 729 (A.F.C.M.R. 1990); *cf. United States v. Shackelford*, 2 M.J. 17 (C.M.A. 1976) (which resulted in a reversal where the military judge used information gained in a rejected providence inquiry to ask a number of questions in front of the court members).

The military judge *should* have explained Winter's options when he rejected the plea. However, his failure to do so does not amount to prejudicial error, since: (1) the government independently proved all facts that Winter had admitted during the providence inquiry; (2) the government had always intended to proceed to trial on the charged offense, even if the pleas to the lesser included offense had been accepted; and (3) the military judge is entitled to the presumption that he performed his sworn duties properly. *See* Article 59(a), UCMJ.

II

In his first assigned error, the appellant challenges the factual sufficiency of the evidence to support the murder conviction. The threshold issue is whether the evidence proves that Winter caused the injuries that resulted in his son's death; if so, the question becomes whether he acted with the requisite intent to kill or inflict great bodily harm.

A

Winter's son, Tony, was born on 18 August 1989. In late September of that year, the infant was taken to the hospital emergency room, purportedly because of a slight fever and vomiting. Winter also mentioned that he had been bouncing Tony on his knee, about six inches off his leg, when the baby "landed wrong" and "went semi-

limp" for "about 30 seconds." Based on an examination and the information provided by his parents, Tony was given medication and released. When the symptoms persisted the next day, he was again taken to the doctor. Tony was admitted to the hospital for three days of observation. At the end of the hospital stay, the doctors thought he had colic and thrush, and released him to his parents.

On 7 October 1989, Winter was alone with his baby while his wife was having her hair cut. He says he was feeding Tony when the baby coughed and spit up a bit of formula. He began to burp the baby, but then, as he described in a statement to the police, the baby:

> went limp (had no muscle control). I panicked because I had no idea what was going on. I shook him (I can't remember how hard I shook him but I had never shaken Tony hard) and he didn't wake up . . . .

The infant did not respond, and Winter began to wash him in the sink, a process that had helped to revive the baby when he "went semi-limp" in late September. Winter eventually called his wife at the beauty shop. She rushed home and they took Tony to the hospital. Efforts to revive the baby failed.

Winter's 7-week old son was a victim of "shaken infant syndrome." His death resulted from "a massive subdural hemorrhage and cerebral edema;" i.e., swelling of the brain caused by shaking. The injuries were described as severe, including tearing of veins, bleeding on the surface of the brain, retinal hemorrhaging and optic nerve sheath damage, all evidence of very forceful shaking. Expert testimony established that repetitive shaking and a great amount of force would have been necessary to cause the injuries. The witnesses testified that no reasonable person would have used such violent force against an infant without understanding the harm that could be caused.

In retrospect, the physicians opined that all of the symptoms the baby had in late September were consistent with an infant who had survived a severe shaking. The routine diagnosis given at the time was based, to a large degree, on information provided by the parents. The possibility of a shaking injury had not been raised.

According to the experts, a fall to the knee (as Winter had described) could not have caused the injuries, nor could gentle shaking or throwing the infant into the air and catching him. Severe, violent force was required. The autopsy revealed two hemorrhages, one causing death and the other about two weeks old. Concerning the second, fatal shaking episode, testimony established that a loss of consciousness would have resulted shortly after the shaking injuries were sustained. The baby's death was conclusively caused by shaking. We are convinced that Winter inflicted the fatal injuries.

Testimony was clear that the second shaking injury was deadly. That shaking was so traumatic that the baby lost consciousness very quickly. Through his pretrial statement to the police, it is clear that Winter was alone with his son during this period of time. Although he says that he was merely feeding Tony when the baby went limp, the evidence shows that Winter must have shaken his baby with great force and violence, causing the fatal injuries. We are satisfied beyond reasonable doubt that Winter inflicted the injuries that caused his son's death. Article 66(c), UCMJ.

B

We now consider whether the Government proved that Winter intended to kill or inflict great bodily harm upon his infant son.[4] The defense urges the record merely

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[4] Under the facts of this case, Winter's conviction can only be sustained under Article 118(2), which provides that a person is guilty of murder when he "intends to kill or inflict great bodily harm." A person is guilty of murder under Article 118(3) when

shows that Winter was a 19-year-old, inexperienced father who lacked child-rearing skills. The defense asks: What was his motive for killing his child? and, Couldn't the shaking injuries have been caused by his efforts to revive Tony when he choked on something?

The intent to kill or inflict great bodily harm may be established through circumstantial evidence. *United States v. Littlehales*, 19 M.J. 512, 516 (A.F.C.M.R. 1984), *affirmed*, 22 M.J. 17 (C.M.A. 1986), *cert. denied*, 476 U.S. 1174 (1986). At issue is whether "the evidence was of such a nature as to exclude every reasonable hypothesis except that of the accused's guilt." *Id.* The Manual for Courts-Martial provides:

> An unlawful killing without premeditation is also murder when the accused had either an intent to kill or inflict great bodily harm. It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended.

MCM, Part IV, paragraph 43c(3)(a) (1984); *see also United States v. Owens*, 21 M.J. 117, 126 (C.M.A. 1985).

The prosecution clearly established that Tony's death was caused by forceful, repetitive shaking. The fatal injuries were not imposed by accident, and the baby did not suffer the assaults on just one occasion. *See United States v. Curry*, 31 M.J. 359, 372 (C.M.A. 1990).

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he "is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life." In *United States v. Berg*, 31 M.J. 38 (C.M.A. 1990), the Court of Military Appeals made it clear that Article 118(3) requires that the accused's conduct must involve danger to more than one person. Following the precedent of *Berg*, Winter's conviction cannot rest under Article 118(3), since his actions were "inherently dangerous" to only a single person, his son Tony.

We are satisfied that Winter understood the harm that could be caused by the violent force he employed against his infant son. He intentionally shook Toney with lethal force. He is culpable under Article 118(2) for the death that resulted. We are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 324-325 (C.M.A. 1987).

III

The appellant next alleges that the military judge erred by allowing an expert witness to engage in an inflammatory demonstration with a mannequin. The witness was describing the amount of force necessary to inflict the fatal injuries sustained by Tony Winter. As an aid, he forcefully shook a doll normally used to demonstrate cardiopulmonary resuscitation techniques.

The relevant testimony and courtroom demonstration are recounted vividly in the record:

> WIT: It would require forces that we describe as severe or violent to cause those kind of damages. It would take things that would be well beyond rough activity with the child and again get in the severe violent range and it would look something like this; very common way to hold it is at the chest or perhaps by the arms and it would look like this:
>
> (Holding the doll under the arms, the witness very violently shook the doll, to the extent the doll's head snapped back and forth and then broke loose and flew from the body.)
>
> WIT: (After a period of silence.) It would be repetitive.
>
> MJ: Counsel, how about retrieving the head?
>
> (Trial counsel picked the doll's head up and reconnected it to the doll's body.)
>
> MJ: The head wouldn't fly off, would it, since it was attached to the neck?

WIT: That's correct.

MJ: All right.

TC: Your honor, I apologize for that. This was worked on to ensure that nothing like this would happen.

MJ: That's fine. It's not a duplication; it's merely an attempt to illustrate.

The demonstration was intended to show the amount of force necessary to cause the fatal injuries to Tony, and to help establish Winter's intent when he shook the infant. The government used the demonstration as an aid to prove the charged offense (as opposed to any lesser included offense), and also to show that the injuries could not have been inadvertently inflicted.

We find that the demonstration had evidentiary value, assisting the trier of fact to understand expert testimony on a relevant issue. *United States v. Thomas*, 6 U.S.C.M.A. 92, 19 C.M.R. 218 (1955). The probative value of the evidence outweighs any inflammatory impact, which was unintended in any event. Mil. R. Evid. 403; *United States v. Pjecha*, 7 M.J. 455 (C.M.A. 1979). Neither the government nor the witness expected the mannequin's head to break loose. The incident did not improperly influence the military judge; the appellant suffered no unfair prejudice from the demonstration.

* * * * *

The other assigned errors are resolved adversely to the appellant. We have also specifically considered the matters raised by the appellant under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find them without merit.

The findings and sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Senior Judge LEONARD and Judge JAMES concur.

OFFICIAL

[SEAL]

/s/ Laura L. Green
LAURA L. GREEN
Documents Examiner
Court of Military Review

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 66573/AF
CMR Dkt. No. 28660

UNITED STATES,
Appellee

v.

HUGH K. WINTER (497-80-1673),
Appellant

MANDATE

TO THE JUDGE ADVOCATE GENERAL, UNITED STATES AIR FORCE:

In the above-styled cause heard by the Court on March 4, 1992, it is, by the Court, this 29th day of September, 1992,

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed. 35 MJ 93 (CMA 1992).

For the Court,

/s/ John A. Cutts, III
JOHN A. CUTTS, III
Deputy Clerk of the Court

[SEAL]

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